

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 92-266

In the Matter of

Implementation of Sections of
the Cable Television Consumer
Protection and Competition Act
of 1992

Rate Regulation

PETITION FOR RECONSIDERATION

New York Telephone Company and New England Telephone and Telegraph Company (the "NYNEX Telephone Companies" or "NTCs") respectfully ask the Commission to reconsider its decision to include low penetration cable systems in its purportedly "competitive" benchmark for setting cable rates.¹

In the Order, the Commission erred in two major respects: first, in framing the question to be decided as that of whether the Commission could redefine a statutory definition; and second, in concluding that there was no good reason to exclude low penetration systems from the benchmark.

In its decision, the Commission stated that the "question at issue" was whether the Commission may adopt a definition of systems subject to "effective competition" that differs from the definition of that term set forth in the

¹ In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket No. 92-266, First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, FCC 93-428, August 27, 1993 ("Order") ¶¶ 124 - 131.

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statute. However, excluding low penetration systems from the benchmark does not require the Commission to redefine "effective competition." "Effective competition" is only relevant to one out of the seven criteria listed in § 623(b)(2)(C). Thus, it is quite clear that under the statutory language the Commission has the power to fashion its benchmark to exclude low penetration systems. In the Commission's own words:

- Congress "did not mandate that we give greater or primary weight to any one statutory goal as we formulate regulations to govern rates . . . but did intend to leave the Commission discretion to determine in the rulemaking process the comparative weight to be assigned to each of the seven factors;"²
- "[N]othing" in the plain language or the legislative history of the Act "mandates that all factors must be weighted equally . . . or that any one factor or set of factors be given primary weight;"³
- In addition to the seven factors listed, "[t]he Cable Act of 1992 also permits to Commission to consider other relevant factors for determining what

² In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket 92-266, Order and Further Notice of Proposed Rulemaking, FCC 93-177, May 3, 1993 ¶ 177.

³ Id. ¶ 179.

constitutes unreasonable rates for cable programming services."⁴

For the Commission now to conclude that its hands are tied by the statute's definition of "effective competition" contradicts its own findings on its discretion to fashion the benchmark. By doing so, it has erected this obstacle itself -- it cannot blame Congress for it; nor can it state that it is powerless to remove it.

The Commission was also incorrect in stating that "the commenters have not presented convincing arguments as to why low penetration systems should be excluded from the sample."⁵ As NYNEX, GTE and Bell Atlantic demonstrated in our Joint Comments, including low penetration systems in the benchmark contravenes Congress' fundamental objectives for cable rate regulation.

As we pointed out in our Joint Comments, the legislative history of the 1992 Cable Act indicates that Congress' purpose in exempting low penetration systems from rate regulation was to relieve small systems from the burdens of regulation. The exemption was not the result of any Congressional impression that low penetration systems lack market power.⁶ As Professor Hazlett demonstrated in his

⁴ Id. ¶ 382.

⁵ Order ¶ 129.

⁶ In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket 92-266, Joint Comments Of Bell Atlantic, GTE, And The NYNEX Telephone Companies In Response To Further Notice Of Proposed Rulemaking ("Joint Comments") pp. 9 - 10.

Affidavit, the Commission's own data shows that low penetration systems have market power.⁷ And, Congress' fundamental and overarching direction to the FCC was to extinguish the effects of market power in establishing reasonable cable rates.⁸

Thus, not only would the Commission not contravene Congress' intent if it excluded low penetration systems from the benchmark; the Commission must exclude low penetration systems to fulfill Congress' mandate of limiting cable market power and ensuring reasonable cable rates.

There are strong indications from consumers and Congress that the "competitive" benchmark as currently formulated (including low penetration systems) does not satisfy Congress' mandate.⁹ News reports indicate that cable rates will go down only for a minority of customers, and that in many cases they will stay the same or even rise.¹⁰ These reactions

⁷ Affidavit of Thomas W. Hazlett, attached to Joint Comments (concluding that "All the evidence indicates that the Type A Systems in the FCC's database do not face competition sufficient to suppress prices below monopoly levels.").

⁸ E.g., Cable Act §§ 1(a)(2), 1(b)(5).

⁹ See Letter to Acting FCC Chairman Quello from Reps. Markey, Shays, and over 100 other Members of Congress, September 24, 1993; See FCC Reviewing Cable TV Rates As Rollbacks Turn Into Increases, The New York Times, September 18, 1993 p. 1.

¹⁰ See Cable Malarkey, The Wall Street Journal, September 28, 1993 p. A18; Why Your Cable Bill Is So High, The Wall Street Journal, September 24, 1993 p. A10; Cable TV Formula Raises Some Rates, The New York Times, September 1, 1993 p. A1; Cable Prices Going Up for Some, New York Newsday, August 26, 1993 p. 43 (about half of Time Warner's New York City subscribers to have higher bills under new rules); Widespread Rate Hikes Seen As Rules Take Effect, Warren's Cable Regulation Monitor, September 6,

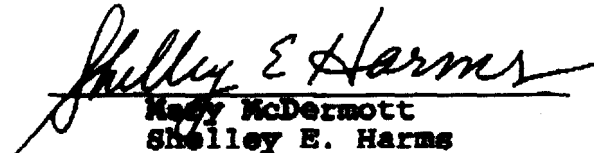
to the new cable rules indicate that the Commission has missed the mark.

The Commission can quickly rectify this situation by removing the low penetration systems from the competitive benchmark. Prompt reconsideration will have the beneficial effect of driving rates down by 17-18%.

The NTCs urge the Commission to correct its erroneous decision including low penetration system rates in its competitive benchmark.

Respectfully submitted,

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and
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10 (Footnote Continued From Previous Page)

1993 p. 2; FCC Reviewing Cable TV Rates As Rollbacks Turn Into Increases, The New York Times, September 18, 1993 p. 1.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing PETITION FOR RECONSIDERATION were served on each of the persons listed on the attached Service List for MM Docket No. 92-266, this 4th day of October, 1993, by first class United States mail, postage prepaid.


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